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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DETROIT INTERNATIONAL BRIDGE COMPANY and THE CANADIAN TRANSIT COMPANY, **Plaintiffs,** **v.** **THE UNITED STATES DEPARTMENT OF STATE, *et al.*,** **Defendants.**	**10-CV-476-RMC** **FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

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I. INTRODUCTION

In 1921, the United States Congress granted its consent to the American Transit Company ("ATC") "to construct, maintain, and operate a bridge…across Detroit River, within or near the city limits of Detroit, Wayne County, Michigan." 41 Stat. 1439. Before construction could begin, Congress also required ATC to get consent from Canada. *Id.* From these simple, bare threads of Congressional consent to build, operate, and maintain a bridge somewhere in the vicinity of Detroit, Michigan, Plaintiffs have spun an elaborate cloak that they claim gives them the unfettered perpetual monopoly to own and operate the only bridge between two sovereign nations anywhere near Detroit, Michigan. Stripped to its essence, Plaintiffs' Third Amended Complaint (the "Complaint") is nothing more than an attempt to rewrite the entire history of the Ambassador Bridge. Plaintiffs ask this Court to not only rewrite the Congressional statutes that authorized the construction and operation of the bridge, but to interfere with the United States' and Canada's sovereign powers to establish and maintain border crossings between their two nations. To get there, Plaintiffs have raised a variety of creative claims in nearly 400 numbered paragraphs in their Complaint. As explained in detail below, none of Plaintiffs' alleged causes of action should be allowed to proceed. This Court lacks jurisdiction to hear some of the claims, and Plaintiffs have failed to state a valid claim for the remainder.

First, in Count One of their Complaint, Plaintiffs have failed to plead a valid claim that the 1972 International Bridge Act ("1972 IBA") violates the non-delegation doctrine by providing advance Congressional consent to agreements between States and foreign governments for the construction of international bridges, while conditioning the effectiveness of such agreements on approval by the Secretary of State. Congress did not delegate any constitutional

power to the State Department in the 1972 IBA. Even if it had delegated some authority, it did so well within the broad confines of the non-delegation doctrine.

Next, in Counts Two and Three, Plaintiffs have failed to identify a cause of action that permits them to bring their claims against the United States. Plaintiffs cannot identify a proper cause of action that permits them to seek declaratory and injunctive relief to revise the express words of a Congressional statute. In addition, even if Plaintiffs had identified valid causes of action, they have failed to state a cognizable claim for relief under any of the theories alleged in their Complaint.

In Count Five,[1] Plaintiffs have ignored the long-settled principle that a district court is without jurisdiction to hear claims for unconstitutional takings. Because the Tucker Act provides an available remedy for Plaintiffs' takings claim, this Court lacks jurisdiction to decide it, even though Plaintiffs claim to seek only declaratory relief.

Plaintiffs' Counts Six and Seven raise claims under the Administrative Procedure Act ("APA") against the State Department relating to the issuance of a Presidential permit for the New International Trade Crossing (the "NITC") and the approval of the Crossing Agreement between Michigan and Canada relating to the NITC. Plaintiffs do not have standing to raise these claims because they cannot demonstrate an injury-in-fact or redressability. In addition, Plaintiffs cannot plead a valid claim to review the Presidential Permit challenged in Count Six, because the permit is presidential action that is not reviewable under the APA. Finally, both the issuance of the Presidential Permit and the approval of the Crossing Agreement are actions committed to agency discretion by law, and are therefore unreviewable under APA § 701(a).

[1] Count Four of Plaintiffs' Third Amended Complaint encompassed Plaintiffs' APA claims against the Coast Guard which have already been briefed on Federal Defendants' Motion to Dismiss, and Plaintiffs' Motion for Partial Summary Judgment. *See* ECF Nos. 92, 96, 106, 110.

Count Eight of Plaintiffs' Complaint raises the narrow non-statutory review doctrine, challenging the State Department's issuance of the NITC permit and its approval of the Crossing Agreement to the extent these are not reviewable under the APA. Plaintiffs' claims fail to meet the narrow standards for non-statutory review and cannot therefore invoke the Court's jurisdiction to review the actions identified by Plaintiffs.

Finally, in Count Nine, Plaintiffs allege that Federal Defendants have violated Plaintiffs constitutional right of equal protection by subjecting Plaintiffs to differential treatment from others similarly situated. Again, Plaintiffs cannot state a valid claim for an equal protection violation because they cannot demonstrate that they have suffered differential treatment, or that any differential treatment was not rationally related to a legitimate government purpose.

This Court lacks jurisdiction over several of Plaintiffs' claims, and Plaintiffs have failed to sufficiently plead a valid claim for the remainder. Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Plaintiffs' Third Amended Complaint must be dismissed.

II. STANDARDS OF REVIEW

A. Standard Under Fed. R. Civ. P. 12(b)(1)

A defendant may move to dismiss a claim for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "Federal Rule of Civil Procedure 12(b)(1) requires that the plaintiff bear the burden of establishing by a preponderance of the evidence that the court has jurisdiction to entertain his claims." *Bennett v. Ridge*, 321 F. Supp. 2d 49, 51 (D.D.C. 2004); *Grand Lodge of the Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001). Thus, "[w]hile the court must accept as true all the factual allegations contained in the complaint, . . . the plaintiff's factual allegations . . . will bear closer scrutiny in resolving a 12(b)(1) motion than in resolving a 12(b)(6) motion for failure to state a claim." *Bennett*, 321 F. Supp. 2d at 51- 52.

B. Standard Under Fed. R. Civ. P. 12(b)(6)

A defendant may move to dismiss a claim for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To avoid dismissal, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007). "The plausibility standard is not akin to a 'probability requirement' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. (citing *Twombly*, 550 U.S. at 556).

Under 12(b)(6), the complaint's factual allegations as true and draws all reasonable inferences therefrom in the plaintiff's favor. *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). A court, however, need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations. *Id*. at 242. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

III. ARGUMENT

A. Factual Background

Congress enacted the original "Act to authorize the construction and maintenance of a bridge across Detroit River within or near the city limits of Detroit, Michigan" on March 4, 1921 (the "1921 ATC Act"). 41 Stat. 1439. The statute gave the American Transit Company[2]

[2] Plaintiff, Detroit International Bridge Company ("DIBC") alleges that it is the successor in interest to ATC's rights under the ATC Acts. Third Amended Complaint ("Compl.") ¶ 23 (ECF No. 105). Plaintiffs also allege that CTC is a wholly-owned subsidiary of DIBC. Compl. ¶ 25. Although Federal Defendants do not hereby admit these or any of the other facts cited in Plaintiffs' Complaint, the Court may accept them as true for purposes of deciding this motion to dismiss. *Browning*, 292 F.3d at 242.

permission to build, operate and maintain a bridge in or near Detroit, Michigan. Before it could begin construction, however, ATC was required to obtain the "proper and requisite authority" for construction from the Canadian government. *Id.* Congress specifically reserved the right to "alter, amend, or repeal this Act." *Id.* at Sec. 3.

Two months later, on May 3, 1921, the Canadian Parliament passed an "Act to incorporate The Canadian Transit Company" ("CTC"). 11-12 George V. Ch. 57 (Can.) (the "1921 CTC Act"). The 1921 CTC Act established the CTC, and provided it with a wide range of authority to build a number of infrastructure works including a bridge. *Id.* at Sec. 1-8. The 1921 CTC Act provided CTC the right to "construct, maintain, and operate a railway and general traffic bridge across the Detroit River from some convenient point, at or near Windsor, Ontario" to somewhere in Michigan. *Id.* at Sec. 8(a). The CTC Act granted the permission to build 20 miles of railway, lay gas pipes, water pipes, and electrical cables and imbued CTC with the powers of a Canadian railway company. *Id.* at 8(a-j). The 1921 CTC Act also prohibited actual construction without "an Act of the Congress of the United States or other competent authority…authorizing or approving" the bridge. *Id.* at Sec. 9. The remainder of the Act permitted a number of activities such as issuing bonds, borrowing money, mortgaging property, and giving equal rights of passage to other companies, among others. *Id* at Secs. 10-21.[3]

Over the course of the next several years, Congress passed three minor amendments to the 1921 ATC Act, extending the deadlines for ATC to begin and complete construction, and giving ATC the right to sell, assign, transfer, or mortgage its interests under the 1921 ATC Act. *See* "the 1924 ATC Amendment," 43 Stat. 103; the "1925 ATC Amendment," 43 Stat. 1128; and

[3] The 1921 CTC Act was also amended, by the following acts of Canadian Parliament: 1) Act of Jun. 28, 1922, 12-13 Geo. V. Ch. 56 (Can.) (the "1922 CTC Amendment"); and 2) Act of Mar. 31, 1927, 17 Geo. V. Ch. 81 (Can.) (the "1927 CTC Amendment") (with the 1921 CTC Act, collectively the "CTC Acts")).

the "1926 ATC Amendment," 44 Stat. 535 (together with the 1921 ATC Act collectively referred to as the "ATC Acts"). None of these statutes altered the original language of the authorization to "construct, maintain, and operate" a bridge in or near Detroit, Michigan. Each of them expressly reserved the United States' right to "alter, amend, or repeal" the law.

The bridge was opened in 1929, and came to be known as the Ambassador Bridge. Compl. ¶ 71. In 1972, Congress passed the International Bridge Act ("IBA"), which provided advance Congressional consent to international bridges subject to approvals by various executive agencies. 33 U.S.C. § 535 *et seq*. Among the provisions of the IBA, Congress gave its consent for States to enter into agreements with the governments of Canada or Mexico for the construction, maintenance of operation of bridges. *Id.* at 535a. Congress conditioned the effectiveness of the agreements on the approval of the Secretary of State. *Id.* The IBA also recognized that the construction of international bridges implicated the President's authority over foreign affairs, and provided that a bridge could not be constructed without the President's approval. *Id.* at 535b.

Plaintiffs allege that they now seek to build a new span of the Ambassador Bridge (the "New Span") to upgrade the existing facility and decrease maintenance costs. Compl. ¶ 6. At the same time, the State of Michigan is working with Canada to construct a new bridge between Windsor, Ontario and Detroit, Michigan (referred to alternatively as the Detroit River International Crossing ("DRIC") or the New International Trade Crossing ("NITC")). Compl. ¶ 7. Through numerous causes of action, Plaintiffs allege that the Federal Defendants' actions with regard to the New Span and the NITC violate the United States Constitution, and the ATC Acts and CTC Acts, as well as the 1909 Boundary Waters Treaty between the United States and

Canada. All of Plaintiffs' claims either lack jurisdiction or fail to state a valid claim for relief. They must be dismissed under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

B. Count One Fails To State A Valid Claim Of Unconstitutional Delegation Of Power Under the 1972 International Bridge Act

The State Department's authority to approve the Crossing Agreement was properly granted by Congress in the 1972 International Bridge Act. Plaintiffs' claim that the IBA is an unconstitutional delegation is incorrect on its face, both as to their characterization of the grant of authority and as to their assertion that there is no intelligible principle to guide the Department's exercise of that authority. Count One should therefore be dismissed under rule 12(b)(6).

1. The 1972 IBA does not delegate Congress' power under the foreign compacts clause

Plaintiffs assert that the IBA unconstitutionally delegates to the State Department Congress's power under Article 1, § 10 of the U.S. Constitution to consent to agreements or compacts between states and foreign powers. This is demonstrably incorrect as a matter of statutory language and legislative history. In fact, Congress itself has exercised its Article 1, § 10 power by consenting in advance to such agreements or compacts relating to international bridges. 33 U.S.C. § 535a. At the same time, Congress conditions the effectiveness of any such agreement on its approval by the Secretary of State. *Id.*

At the time of enactment, Congress made clear that it was separating Congress's consent to interstate compacts, on the one hand, and the conditioning of their effectiveness on approval by the Secretary of State, on the other. The House report accompanying the Act expressly discussed the two different decisions, noted the extensive discussion on the subject of constitutionality that had taken place in the hearing on the Act, and adverted to (and attached) a memorandum on the subject provided by the Legal Adviser of the Department of State. H.R.

Rep. 92-1303, 92nd Cong., 2d Sess. 4 (1972). The report observed that advance consent to compacts was necessary to accomplish the purpose of the IBA:

> Since this proposed act is designed to eliminate the necessity of ad hoc congressional consideration of international bridges, it would be anomalous to grant consent…but then require ad hoc [congressional] approval of the agreements pursuant to which they were to be constructed.

Id. The Legal Adviser's memorandum to Congress concluded that "Congress may, under the Constitution, grant consent in advance to compacts and agreements between states and their subdivisions and foreign governments, and . . . such consent may be conditioned on approval of the terms of such agreements by the Department of State." *Id*. at 15. The report also made clear why Congress wished the Department of State to approve such compacts and agreements. The Legal Adviser's memorandum to Congress observed:

> In the past, bridge agreements…have not been reviewed by anyone at the federal level for possible impact on foreign policy. We believe such a review would be in the national interest, and further believe that the Secretary of State would be an appropriate person to conduct such a review.

Id. at 12. Accordingly, Plaintiffs' claim that the IBA is an unconstitutional delegation of power ignores the fact that Congress was well aware of the constitutional limits of its power, and specifically drafted the statute to avoid an impermissible delegation. Congress is the entity giving its consent to the agreements between the States and foreign nations. The agreement's effectiveness is conditional on the Secretary of State's approval after review for foreign policy concerns. The Secretary of State has not been delegated Congress' foreign compact clause power, and Plaintiffs cannot therefore state a valid claim under the non-delegation doctrine.

2. Even if the non-delegation doctrine was applicable, Congress supplied an intelligible principle to guide the State Department's actions

Plaintiffs' assertion that the IBA lacks an intelligible principle to guide the Secretary of State's decision-making when approving these agreements is simply incorrect on its face. There

is no dispute that Congress may delegate its legislative power to the other branches as long has it has set forth "an intelligible principle to which the person or body authorized to act is directed to conform."[4] *TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001)). The statute here satisfies the constitutional requirements.

The Supreme Court has summarized its jurisprudence on this point as follows: "[I]n the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman*, 531 U.S. at 474 (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). The application of the intelligible principle test has long

[4] Plaintiffs have not properly alleged that the lawmaking power of Congress is even at issue here. As the text of Article I and the Supreme Court's formulation of the doctrine make clear, the nondelegation doctrine does not apply every time Congress confers any power on another branch, but only when Congress attempts to delegate legislative power. *See, e.g., Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) ("In a delegation challenge, the constitutional question is whether the statute has delegated *legislative* power to the agency.") (emphasis added)). The Supreme Court has noted, "[t]he true distinction ... is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Field v. Clark*, 143 U.S. 649, 693-94 (1892) (internal quotation marks omitted). The 1972 IBA confers no lawmaking or rulemaking powers on the Secretary of State. Because the 1972 IBA "[does] not in any real sense invest the [Secretary of State] with the power of legislation," *J. W. Hampton v. U.S.*, 276 U.S. 394, 410 (1928), but instead authorizes him only to take traditionally executive action, the nondelegation doctrine is inapplicable and there is no requirement of an intelligible principle. *See Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 399 (1940) ("Since law-making is not entrusted to the industry, this statutory scheme is unquestionably valid."); *see also Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement."). For this alternative reason, Plaintiffs have failed to state a valid claim challenging the constitutionality of the IBA.

been "driven by a practical understanding that . . . Congress simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta v. United States*, 488 U.S. 361, 372 (1989). It is sufficient for Congress to "delineate[] the general policy, the public agency which is to apply it, and the boundaries of the delegated authority." *Id*. at 372-73 (internal quotations and citations omitted). Indeed, "[c]ourts 'have almost never felt qualified to second guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Michigan Gambling Opposition*, 525 F.3d 23, 30 (D.C. Cir. 2008) (quoting *Whitman*, 531 U.S. at 474-75). The doctrine against delegation is therefore very narrow, as evidenced by various cases in which the Supreme Court has held that a statutory directive to regulate in the "public interest" satisfies the intelligible principle test. *See, e.g.*, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26 (1943). To successfully challenge a Congressional delegation, then, a plaintiff must meet a very high bar.

If findings of impermissible delegations are rare, they are rarer still when Congress delegates authority over matters of foreign affairs. The Supreme Court has explained that "Congress – in giving the Executive authority over matters of foreign affairs – must of necessity paint with a brush broader than that it customarily wields in the domestic area." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *see also U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) (noting that in foreign affairs Congress has long granted the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."). This is so because of the "changeable and explosive nature" of international affairs and because the Executive must be able to quickly react to information that cannot be easily relayed to and evaluated by Congress. *Zemel*, 381 U.S. at 17. Moreover, when transacting with foreign nations, the Executive must act with "caution and unity of design." *Curtiss-Wright*,

299 U.S. at 319 (internal quotations and citations omitted). The Supreme Court has concluded that it is therefore unwise to require Congress to establish narrow standards when delegating authority over foreign affairs. *Id*. at 321-22. When looking for the broad general directive that will satisfy the intelligible principle test, the court need not be constrained to testing the statutory language in isolation. *TOMAC*, 433 F.3d. at 866 (citing *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946)). Rather, "the statutory language may derive content from the 'purpose of the Act, its factual background and the statutory context in which they appear.'" *Id*. (quoting *Am. Power & Light Co.*, 329 U.S. at 104). The court must therefore consider the legislative history and factual circumstances surrounding the passage of the IBA in determining whether or not there is an intelligible principle guiding Section 535a of the IBA. *See id*.

Here, there is a framework formed by the statute, the legislative history, Executive Order 11423, 33 Fed. Reg. 11741, as amended, and the long-recognized authority of the Executive branch in matters of foreign policy. 33 U.S.C. §§ 535a, 535b; *see also Presidio Bridge Co. v. Sec'y of State*, 486 F. Supp. 288, 296 (W.D. Tex. 1980) (examining the legislative history of the IBA and noting it is to be read in concert with Executive Order 11423). This framework provides the intelligible principle governing the State Department's review of the terms of any crossing agreement, including this one. *Michigan Gambling Opposition*, 525 F.3d at 381 (intelligible principle discerned after reviewing the purpose and structure of the challenged statute, which should not be read in isolation). Plaintiffs' proposed attempt to bring a sweeping constitutional challenge to the IBA does not withstand scrutiny.

First, the statute itself is concerned only with international bridges crossing the borders between the United States and Mexico or Canada. 33 U.S.C. § 535. The agreements covered by the statute are agreements between States and the governments of Canada or Mexico. 33 U.S.C.

§ 535a. It is clear even from these bare facts that the thrust of Congressional concern in the statute centers on matters of foreign policy and international relations with bordering countries. In addition, the State Department's central role in United States foreign policy provides sufficient indication that Congress intended that the State Department's review of agreements between States and foreign countries was to focus on foreign policy interests of the United States. Finally, the legislative history of the 1972 IBA provides even more clarity as to the principle Congress articulated for the State Department to apply. As noted above, the Report from the House Committee on Foreign Affairs explains that the State Department was to review the agreements for "possible impact on foreign policy." H.R. REP. NO. 92-1303, at 12 (1972).

Moreover, the IBA was a coordinated effort between the Executive branch and the Legislative branch to create a uniform system for approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 295-96 ("after four years of work in drafting a bill, the President issued an Executive Order anticipating its final passage…the bill…was passed by a Congress that was well aware of both the provisions of the order and the reason for its existence."). Executive Order 11,423 was drafted in anticipation of the IBA, which would grant advance Congressional approval of international bridges. *Presidio Bridge Co.*, 486 F. Supp. at 296 ("the two documents are compatible with, and companions to one another"); *see also* Executive Order 11423, 33 Fed. Reg. 11741. The Executive Order explains that "the proper conduct of foreign relations requires that executive permission be obtained for the construction and maintenance…of facilities connecting the United States with a foreign country." 33 Fed. Reg. at 11741. Taken together, the statute, legislative history, and Executive Order confirm the principle guiding the State Department's approval of these agreements: they must be reviewed for impacts on U.S. foreign policy and foreign relations. This guidance would handily satisfy the intelligible

principle requirement even if the delegation concerned authority over domestic affairs. Given that the delegated authority is a matter of foreign affairs, there is essentially no question that it survives constitutional scrutiny.

This reading of the statute in light of its history is analogous to the Supreme Court's reading of the statute at issue in *Zemel*. In that case, the Supreme Court found that Congress properly granted the State Department the authority to refuse to validate U.S. passports for travel to Cuba. *Zemel*, 381 U.S. at 7. While the statutory language in *Zemel* simply granted the Secretary the authority to grant and issue passports without an explicit guiding principle, the Supreme Court held that the statute "must take its content from history: it authorizes only those passport refusals and restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Id*. at 17-18 (omitting internal quotation and citation). Thus, the *Zemel* court found it sufficient that Congress delegated authority to the State Department with an understanding of the manner in which the State Department would implement that authority. *Id*. It was not necessary for Congress to spell it out in the statute. *Id*. As explained above, this broad delegation was acceptable to the Court because it would be unwise to restrict the State Department's actions with a narrower standard given the delicate and quickly changing nature of international relations. *Id*. at 17; *see also Curtiss-Wright*, 299 U.S. at 321-22. Similarly, here, Congress has authorized the State Department to approve agreements with the understanding that the Department will do so only after reviewing such agreements for "impacts on foreign policy." H.R. REP. NO. 92-1303, at 11-15 (1972). Indeed, Congress' understanding of how the State Department will exercise the delegated power is even more clear in this case than it was in *Zemel* because here that understanding is explicitly expressed in the House

Committee Report. *Id*. In contrast, the *Zemel* court inferred Congress' understanding from the State Department's "prior administrative practice." *Zemel*, 381 U.S. at 17-18.

The delegation in the IBA thus clearly meets the standard for an intelligible principle as applied to delegations concerning foreign affairs. *Id.; see also Curtiss-Wright*, 299 U.S. at 324, 328 (explaining that the Court should not be hasty to disturb the longstanding legislative practice of delegating broad authority over foreign affairs). A claim challenging the constitutionality of a delegation carries the heavy burden of showing the complete lack of an intelligible principle. *See National Broadcasting Co.*, 319 U.S. at 225-26; *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1475 (D.C. Cir. 1998). Because the language, history, and factual context make clear that the State Department is to approve only agreements consistent with U.S. foreign policy, Plaintiffs cannot allege any set of facts which would entitle them to relief on Count One.

C. Counts Two And Three Must Be Dismissed Because Plaintiffs Have Failed To Identify A Private Right of Action And Plaintiffs Have Failed To State A Valid Claim

Under the auspices of the Declaratory Judgment Act, Counts Two and Three of Plaintiffs' Complaint ask this Court to make a number of declarations to expand and amend Plaintiffs' rights under the 1921 statute that permitted ATC to build and operate the Ambassador Bridge. As an initial matter, Plaintiffs have not identified a valid cause of action to allow them to bring these claims. Moreover, even if the Court were to find that Plaintiffs had identified an independent cause of action to support Counts Two and Three, Plaintiffs have failed to state a valid claim in either of these two Counts and they must be dismissed pursuant to Rule 12(b)(6).

1. Plaintiffs have failed to identify an independent cause of action to support Counts Two and Three of the Third Amended Complaint

It is axiomatic that to pursue relief in federal court, a plaintiff must have a cause of action. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (rejecting plaintiff's claims

because they did not have a cause of action to pursue their claims); *see also Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person.").[5] Plaintiffs carry the burden of showing that a cause of action exists. *Suter v Artist M.*, 503 U.S. 347, 363-364 (1992). Plaintiffs' Complaint is devoid of any reference to a valid cause of action that permits them to bring Counts Two and Three, and the claims must be dismissed.

a. The Declaratory Judgment Act is not an independent cause of action

Plaintiffs first identify the Declaratory Judgment Act, 28 U.S.C. § 2201, as the basis for their cause of action in Counts Two and Three. *See* Compl. ¶¶ 299-300; 315-316. The Declaratory Judgment Act, however, does not provide a cause of action but is simply a procedural statute that expands the "range of remedies available in the federal courts." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671, 70 S. Ct. 876, 879, 94 L. Ed. 1194 (1950); *see also C&E Servs., Inc. of Washington v. Dist. of Columbia Water & Sewer Auth.*, 310 F.3d 197,

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[5] In addition to jurisdiction and a cause of action, in suits against the Government, Plaintiffs must identify an applicable waiver of sovereign immunity. *Lehman v. Nakshian*, 453 U.S. 156, 160 (1981) ("[T]he United States, as sovereign, is immune from suit save as it consents to be sued and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit."); *In re Olson*, 884 F.2d 1415, 1428 (D.C. Cir. 1989); *see also United States v. Mottaz*, 476 U.S. 834, 841 (1986) ("When the United States consents to be sued, the terms of its waiver of sovereign immunity define the extent of the [reviewing] court's jurisdiction"). A claim asserted against the Government that does not fall within the scope of a waiver of sovereign immunity must be dismissed under Rule 12(b)(1). *See, e.g.*, *P&V Enterprises v. U.S. Army Corps of Eng'rs*, 516 F.3d 1021, 1026 (D.C. Cir. 2008).

Here, as to Federal Defendants, Plaintiffs identify only one waiver of sovereign immunity in their Third Amended Complaint – the APA waiver found at 5 U.S.C. § 702. *See* Compl. ¶ 50. Although it is not specifically pled in any of their causes of action, Defendants presume that Plaintiffs intend to rely on that provision as the waiver of sovereign immunity applicable to all of their claims. *See Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006) (holding that the APA waiver of sovereign immunity is not limited to suits brought under the APA). If Plaintiffs are not relying on the APA waiver of sovereign immunity, then Counts Two and Three should be dismissed for lack of jurisdiction because Plaintiffs have failed to identify any other waiver that could allow those claims to proceed.

201 (D.C. Cir. 2002) (holding that the Declaratory Judgment Act "is not an independent source of federal jurisdiction" and that "the availability of [declaratory] relief presupposes the existence of a judicially remediable right."). The D.C. Circuit has unambiguously held, "plaintiffs have not alleged a cognizable cause of action and therefore have no basis upon which to seek declaratory relief. *Nor does the Declaratory Judgment Act, 28 U.S.C. § 2201, provide a cause of action.*" *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011) (emphasis added).[6]

b. None of the other statutes underlying Counts Two and Three provide a cause of action

It appears that with regard to Counts Two and Three, Plaintiffs also claim causes of action under the statutes and treaties relating to the governmental authorizations for building the Ambassador Bridge. *See* Compl. ¶¶ 89; 301-311; 317-322 (referring to the 1909 Boundary Waters Treaty, and the ATC and CTC Acts granting Plaintiffs' predecessors permission to build a bridge, as well as the 1972 IBA). Neither the statutes nor the Treaty provide a valid cause of action, and Counts Two and Three must therefore be dismissed for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[7]

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[6] To the extent that Plaintiffs rely on *Committee of the Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53 (D.D.C. 2008), to support their cause of action under the Declaratory Judgment Act ("DJA"), that reliance is misplaced. First, the later statement of the D.C. Circuit in *Ali v. Rumsfeld* is unequivocal and clearly holds that the Declaratory Judgment Act does not supply a "cause of action." 649 F.3d at 778. Second, to the extent that *Committee of the Judiciary* can be read to fashion an exception to this well-settled rule, it is only in cases where a constitutional right is at stake. 558 F. Supp. 2d at 82. Here, none of Plaintiffs' claims in Counts Two and Three are premised on a constitutional violation, so the DJA cannot provide the cause of action, even under the questionable rationale in *Committee of the Judiciary*.

[7] In addition, Plaintiffs plead a generic common law right of action to "protect property right[s] from those who invade [them]" and for an unspecified "common-law right of action to enforce their contractual rights." Compl. ¶¶ 90-93. Although it is unclear from Plaintiffs' Complaint whether either of these causes of action underlie Counts Two and Three, neither of them are valid causes of action against the United States for Counts Two and Three. First, to the extent Plaintiffs are alleging an illegal invasion of a property interest by the United States, their

"Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979)). To determine whether a private right of action exists under a particular statute, the Court must determine whether Congress intended to create both a private right and a private remedy. *See Id.* (citing *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979)). Absent clear Congressional intent to create a right and a remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id*. at 286-87; *see also McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) cert. denied, 133 S. Ct. 1582 (U.S. 2013) ("As the Supreme Court has 'sworn off' implied rights of action…absent the compelling and unusual circumstances that animated the Court's analysis in *Sosa*, we decline to imply causes of action in the face of congressional silence."); *Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Grp.*, 219 F. Supp. 2d 20, 33 (D.D.C. 2002) ("[L]anguage that creates a right is insufficient to create a right to sue" because, in Sandoval the Supreme Court "made clear that the statute must provide not only a private right but also a

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cause of action lies in the Takings clause of the Constitution, which they have pled in Count Five of their Complaint (Compl. ¶¶ 332-339). As discussed in Section III.D., below, this Court has no jurisdiction over Plaintiffs' claim for declaratory relief for a takings claim.

With regard to an alleged breach of contract rights, it is well established that "[t]he waiver of sovereign immunity in the Administrative Procedure Act does not run to actions seeking declaratory relief or specific performance in contract cases." *Sharp v. Weinberger*, 798 F.2d 1521, 1523 (D.C. Cir. 1986). Accordingly, the United States has not waived its sovereign immunity, and this Court has no jurisdiction to proceed on claims for declaratory or injunctive relief premised on Plaintiffs' alleged contract rights. *See Id.* at 524 (ordering District Court to dismiss for lack of jurisdiction because "[w]e know of no case in which a court has asserted jurisdiction either to grant a declaration that the United States was in breach of its contractual obligations or to issue an injunction compelling the United States to fulfill its contractual obligations.").

private remedy."). Here, neither the treaty nor the statutes identified by Plaintiffs create a private right of action, and Counts Two and Three must be dismissed.

i. There is no private right of action in the 1909 Boundary Waters Treaty

First, there is nothing in the language of the 1909 Boundary Waters Treaty (the "Treaty") that grants any private right of action. *See* 36 Stat. 2448. Despite amending their Complaint three times, Plaintiffs have not identified a single reference to a private right of action in the 1909 Boundary Waters Treaty itself. The Treaty therefore cannot supply Plaintiffs with a cause of action. *See Miller v. United States*, 583 F.2d 857, 859-60 (6th Cir. 1978) ("The District Court correctly dismissed the Miller's claim under the 1909 treaty. The treaty does not create additional private rights of action for a United States citizen against his own government."); *accord Erosion Victims of Lake Superior Regulation v. United States*, 12 Cl. Ct. 68, 72 (1987) *aff'd*, 833 F.2d 297 (Fed. Cir. 1987). "A treaty is primarily a compact between independent nations [that] depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092-93 (D.C. Cir. 1980) (internal citations and quotations omitted). "[I]ts infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, [but] [i]t is obvious that with all this the judicial courts have nothing to do and can give no redress." *Id*.; *see also Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, 471 (D.C. Cir. 1940). The 1909 Boundary Waters Treaty cannot confer a private right of action, and Counts Two and Three must be dismissed for failure to state a claim.

ii. The ATC Acts do not confer a private right of action

None of the ATC Acts granting ATC the right to build a bridge contain a private right of action.[8] Although DIBC claims that it has a "right to enforce and protect its statutory rights arising directly under" these statutes (Compl. ¶ 89), there are no provisions in these statutes granting DIBC (or ATC) the right to enforce or protect any rights whatsoever. The 1921 ATC Act simply states that "the consent of Congress is hereby granted to [ATC] to construct maintain and operate a bridge and approaches thereto" somewhere in or near Detroit, Michigan. 41 Stat. 1439. The 1921 ATC Act goes on to state that "*before construction of the said bridge* shall be begun all proper and requisite authority therefor shall be obtained from…Canada." *Id.* (emphasis added). Finally, Congress expressly reserved the right to "alter, amend, or repeal" the 1921 ATC Act. *Id.* at Sec. 3.

The 1924 and 1925 ATC Amendments simply extended the deadlines for beginning and ending construction of the bridge. *See* 43 Stat. 103 at Sec. 1; 43 Stat. 1128 at Sec. 1. In both

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[8] Plaintiffs also rely in passing on the CTC Acts as a source of a private right of action. Compl. ¶89. Plaintiffs claim that the CTC "has a right to enforce and protect its statutory rights arising directly under the Canadian Act – a statute that expressly *confers rights solely upon CTC*." Compl. ¶ 89 (emphasis added). As an initial matter, this Court lacks jurisdiction to hear claims by a Canadian Plaintiff (CTC) against the United States government based on obligations contained in Canadian statutes that inure solely to the benefit of the Canadian Plaintiff. That is not "an action arising under the Constitution, laws or treaties of the United States" and must be dismissed for lack of jurisdiction. *See* 28 U.S.C. § 1331.

Even if Plaintiffs could overcome that jurisdictional hurdle, the CTC Acts suffer from the exact same defect as Plaintiffs' purported cause of action under the ATC Acts – there is no express or implied right of action. The original 1921 CTC Act provided that CTC "may construct, maintain and operate a railway and general traffic bridge across the Detroit River from some convenient point, at or near Windsor, in the province of Ontario" but does not contain any express remedy. EX. 1 (the 1921 CTC Act). The other two acts mentioned by Plaintiffs are similarly devoid of any mention of a private right of action. *See* EX. 2 (the 1922 CTC Amendment); EX. 3 (the 1927 CTC Amendment). Acknowledging this shortcoming, Plaintiffs are left with an allegation that by operation of purported Canadian common law principles, there is a private right of action implied as a result of the "special agreement" comprised of the ATC Acts and CTC Acts. Compl. ¶ 89 ("the creation of a franchise implies a right to sue to enforce the franchise"). This contention is also meritless, and is addressed in Section C.1.b.iii, below.

statutes Congress again expressly reserved the right to alter, amend, or repeal the Act. *Id*. In 1926, Congress passed an amendment that once again extended the construction deadlines, and required the American Transit Company to provide a report on costs of the bridge to the Secretary of War. 44 Stat. 535. The 1926 ATC Amendment also granted the American Transit Company "the right to sell, assign, transfer, and mortgage all the rights, powers, and privileges conferred by this Act." *Id.* at Sec. 3. Congress again expressly reserved the right to "alter amend or repeal this Act." *Id.* at Sec. 4.

None of the ATC Acts can be read to provide any private right of action whatsoever. Although they may be read to provide some private rights, the statutes and their accompanying legislative histories are entirely silent with regard to private remedies. This fact alone is fatal to Plaintiffs' alleged cause of action under the Supreme Court's reasoning in *Sandoval*, which noted that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." 532 U.S. at 287.

However, in addition to the ATC Acts' silence as to any private right of action, recognition of a cause of action would actually run contrary to the Congressional purpose behind the ATC Acts. Those acts were intended to give nothing more than Congress' "consent" to ATC to build, operate and maintain a bridge in the general vicinity of Detroit. *See* 41 State. 1439 at Sec. 1. Congress retained the United States' sovereign authority over international bridges in the interest of regulating commerce and navigation, and expressly reserved the right to alter, amend, or repeal all four statutes in their entirety. *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 707 (1987) (holding that the United States retained its dominant navigational servitude even though lands had been passed to a sovereign Native American tribe by treaty). Construing similar bridge statutes, the Supreme Court characterized them by saying, "[w]hat the company

got from Congress was the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce." *Newport & C. Bridge Co. v. U. S.*, 105 U.S. 470, 481-82, 26 L. Ed. 1143 (1881). "It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist upon." *Id.* at 482. Inferring a cause of action against the United States would undermine the very interests that Congress was trying to protect when it expressly reserved the right to unilaterally alter, amend, or repeal the statute. Simply put, there is no evidence of Congressional intent to create a private right of action under any of the ATC Acts.[9] The implication of such a right by this Court would run contrary to the ATC Acts and to the Supreme Court's admonition against implied rights of action contained in *Sandoval*. *See* 532 U.S. at 275. The Court therefore has no jurisdiction over Counts Two and Three of Plaintiffs' Complaint because Plaintiffs have failed to identify a valid cause of action under the ATC Acts.

iii. Plaintiffs' allegation of a "special agreement" under the 1909 Boundary Waters Treaty cannot save their cause of action

Since neither the 1909 Boundary Waters Treaty nor the DIBC and CTC Acts themselves contain a valid cause of action, Plaintiffs are left with their allegation that a "Special Agreement formed by the U.S. and Canadian Acts" under the 1909 Treaty is the source of their cause of

[9] One court appears to have implied a right of action to enforce a bridge franchise under a statute similar to the 1921 ATC Act. *See Puente de Reynosa, S.A. v. City of McAllen*, 357 F.2d 43, 47 (5th Cir. 1966). In that case, the court simply assumed without analysis that it should "look beyond the franchise rights expressly granted by statute" to find a justiciable interest. *Id*. This out-of-circuit case was decided long before the Supreme Court's limitation on implied rights of action in *Sandoval*, has been overruled to the extent it conflicts with *Sandoval's* holding, and cannot save Plaintiffs' cause of action here.

action. Compl. ¶ 89.[10] In essence, Plaintiffs allege that because the ATC Acts and CTC Acts were 1) signed into law at roughly the same time; 2) assertedly enacted under the auspices of the 1909 Boundary Waters Treaty; and 3) both covering the same bridge project, they constitute a "special agreement" that operates to impute a private right of action that did not exist in the underlying treaty or statutes. The alleged "special agreement" does not contain an express right of action. Plaintiffs cannot imply a right of action in an alleged "special agreement" any more than they can imply one from the underlying treaty or statutes.

There is nothing in the 1909 Boundary Waters Treaty, the ATC Acts or the CTC Acts that would support the "two plus two equals five" inference Plaintiffs are asking the Court to make. First, "special agreements" are loosely defined in the Treaty as including "not only direct agreements between the [U.S. and Canada] but also any mutual arrangement between [the U.S. and Canada] expressed by concurrent or reciprocal legislation." 36 Stat. 2448, 2454 (Article XIII). More importantly, the Treaty only references "special agreements" to exempt certain projects from certain prohibitions or restrictions on projects that affect the boundary waters between the two countries. For example, Article III provides that except as "hereafter provided for by special agreement between the Parties hereto, no [other projects] affecting the natural level or flow of boundary waters on the other side of the line" are permitted. *Id*. at 2449 (Art. III). The special agreement reference simply recognizes that the United States and Canada may agree to work together on certain projects that would otherwise not be permitted by the Treaty.

[10] Federal Defendants do not agree that the U.S. and Canadian statutes referred to in Plaintiffs' complaint actually comprise a "special agreement" as that term is used in the 1909 Boundary Waters Treaty. *See* Compl. ¶¶ 57-62. For purposes of this motion only, the Court can accept as true Plaintiffs' allegations that the statutes comprised a special agreement under the 1909 Boundary Waters Treaty. Assuming there is a special agreement, it still does not confer a private right of action.

Next, there is no provision in the ATC Acts that incorporates any implied right of action either from American common law or Canadian common law. The 1921 ATC Act is not *conditioned* on any Canadian statute at all. Its purpose was to give Congressional consent for ATC to build a bridge somewhere near Detroit. The Act granted ATC that consent. The only relevant condition in the ATC Act was that ATC was prohibited from *starting construction* unless and until it secured the approval of Canada. 41 Stat. 1439. This common-sense provision for a statute authorizing construction of an international bridge does not imply that the United States consented to be bound by any aspect of Canadian law, least of all an alleged private right of action that may or may not exist in Canadian common law.

Similarly, the CTC Acts are devoid of reference to any United States sources of law. *See* EXS. 1-3 (the three CTC Acts). Yet without any support, Plaintiffs blithely allege that because the statutes were "concurrent and reciprocal" (Compl. ¶ 302), "Plaintiffs' rights under the [two statutes] are reciprocal as between the United States and Canada." Compl. ¶ 303. There is no mention of an express cause of action in any of the CTC Acts. Plaintiffs have simply conjured an unspecified Canadian common law right of action by asserting that it is inherent in an implied Canadian common law doctrine of exclusivity of franchise rights, which has been incorporated *sub-silentio* into the CTC Acts. Compl. ¶¶ 79-81.

Missing in Plaintiffs' logic is an explanation how the concurrent or reciprocal nature of the statutes (if it exists), supports the inference that the United States was agreeing to be bound by Canadian implied rights of action in common law.[11] There is nothing about the timing of

[11] Indeed, by Plaintiffs' flawed logic it would be equally as likely that Canada's silence in the CTC Acts was waiving any rights of action to enforce implied rights of exclusivity in Canadian law in favor of the well-settled American principle that no rights pass from the sovereign by implication. *See Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 421 (1837). It is precisely to address the impossibility of divining meaning

passage of the two statutes that would raise an inference that the substantive terms of one (whether explicit or implied) were intended to be incorporated into the other – much less give any guidance as to how the differences between the two were to be resolved into "agreement." Plaintiffs characterize the ATC Act as "stat[ing] that it is meant to operate in tandem with the Canadian Act." Compl. ¶ 85. A simple reading of the statutory language reveals that is not true. 41 Stat. 1439. The only mention of Canada in the ATC Act is the requirement that ATC obtain permission from Canada before starting construction. *Id*. Moreover, comparing the language of the 1921 ATC Act with the 1921 CTC Act makes clear that the CTC Act focuses largely on issues regarding railroads, and references specific Canadian railroad statutes. If the ATC Acts were meant to incorporate common law terms that were not contained in the CTC Act why would it not follow that the ATC Acts were to incorporate the powers of a Canadian railroad company which were specifically mentioned in the CTC Act? Plaintiffs gloss over the clear differences between the statutes because it highlights the impossibility of their position. There is nothing about the timing of passage of the two statutes that would raise an inference that the substantive terms of one (whether explicit or implied) were intended to be incorporated into the other – much less give any guidance as to how the differences between the two were to be resolved into an "agreement."

Plaintiffs' failure to explain the connection between the alleged concurrent and reciprocal nature of the Acts and the alleged implied rights of action from Canadian common law is especially glaring because Plaintiffs also incorrectly attempt to incorporate from Canadian law the notion that the Ambassador Bridge is entitled to exclusivity. Indeed, the crux of Plaintiffs' claims (with the exception of Count Four against the Coast Guard) rests entirely on the notion of

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from silence that the Supreme Court has consistently held that no rights are granted by implication.

perpetual exclusivity which Plaintiffs tacitly admit is not part of the ATC Act. As explained in more detail below in Section III.C.2, if there is no perpetual exclusive right to operate the *only bridge* on the Detroit River for all of eternity, then Plaintiffs are forced to concede that other bridges are permitted, and they have suffered no injury to any rights they may have by virtue of another bridge being built in the general vicinity of Detroit. Plaintiffs tacitly acknowledge that there is no exclusive right under U.S. law because the foundation of their argument is that "[u]nder Canadian law, Plaintiffs' statutory and contract rights are exclusive." Compl. ¶ 304.[12] They make no similar statement with regard to U.S. law. Plaintiffs then attempt to bootstrap these alleged implied Canadian rights of exclusivity with their alleged attendant common law right of action for enforcement, and impute the entire scheme of right and remedy into the ATC Acts by virtue of their alleged "concurrent and reciprocal" nature under the 1909 Boundary Waters Treaty. Compl. ¶¶ 302-303. This is both illogical and simply not possible under the relevant Supreme Court precedent. *See Sandoval*, 532 U.S. at 286-87. Plaintiffs have failed to plead a sufficient basis on which to imply a private right of action from Canadian common law, to enforce rights under U.S. statutes against the Federal Defendants. Counts Two and Three must therefore be dismissed under Rule 12(b)(6) for failure to state a claim because Plaintiffs have not identified a valid cause of action that can be raised against the United States.

[12] There is no express provision of exclusivity in the CTC Acts. The lack of an express provision of exclusivity in any of these statutes is all the more striking because in a contemporaneous statute establishing the Buffalo and Fort Eerie Public Bridge Company, the Canadian Parliament included a clear express grant of exclusivity for the Niagara River bridge. 13-14 Geo. V. Ch. 74 (Can.) at p. 2 ("provided, always that no other bridge for a like purpose shall be constructed or located at any point nearer than six miles from the location of the bridge of the Company") (attached hereto as EX. 4). Thus, at the time of the CTC Acts, the Canadian Parliament was well aware of how to provide express grants of exclusivity when it intended to. There is no basis for presuming an implied grant of an exclusive franchise in the face of the CTC Acts' silence.

2. Counts Two and Three also fail to state a claim on which relief can be granted

Even if Plaintiffs could state a valid cause of action, Counts Two and Three of Plaintiffs' Third Amended Complaint fail to state a valid claim for relief. Under the guise of an action for Declaratory Judgment and injunctive relief, Counts Two and Three ask this Court to amend the ATC Acts and the CTC Acts to include a number of specific provisions that in hindsight, Plaintiffs wish had been included in the original statutes.[13] Plaintiffs' requests for relief include declarations from the Court that 1) DIBC's right to operate a bridge is exclusive of all other rights to operate a bridge; 2) DIBC's right is perpetual; 3) the United States is prohibited from authorizing any other bridge that might divert toll revenue from DIBC; 4) the United States and Canada may not approve the NITC except on conditions specified by Plaintiffs. Notably, the ATC Acts and CTC Acts do not contain any reference to these wide-ranging powers and rights claimed by DIBC.

Having failed to obtain from Congress a perpetual exclusive monopoly over all international bridges in the vicinity of Detroit, Plaintiffs ask this Court to provide it for them. This is an entirely improper use of the Declaratory Judgment Act. Nearly 200 years of precedent makes clear that the statutory grant itself is determinative of the scope of the rights granted in a statute. The entirety of Counts Two and Three hinge on this Court's willingness to imply terms

[13] Plaintiffs previously attempted this strategy in claiming that they possessed the sovereign power of eminent domain as a federal instrumentality. *Commodities Exp. Co. v. City of Detroit*, 09-CV-11060-DT, 2010 WL 2633042, at *2 (E.D. Mich. June 29, 2010). That attempt also failed. *Id.* at *20 ("DIBC is not a federal instrumentality, and [is] enjoin[ed]…from claiming such status and potentially subjecting the United States to liability for DIBC's actions.") *aff'd sub nom. Commodities Exp. Co. v. Detroit Int'l Bridge Co.*, 695 F.3d 518 (6th Cir. 2012). This more elaborate attempt to claim the powers of a sovereign fares no better, and must also be rejected.

into the Congressional grants that are not expressly provided. Accordingly, Counts Two and Three must be dismissed for failure to state a claim.

a. When Congress gives its assent to the construction of a bridge, there are no implied franchise rights, and the grant itself controls

"In grants by the public, nothing passes by implication." *Proprietors of Charles River Bridge*, 36 U.S. at 421. The right to establish one bridge and fix its rate of toll does not imply a power to bind the State or its instrumentalities not to establish another in case of necessity." *Wright v. Nagle,* 101 U.S. 791, 796 (1879). Congress "is the constitutional protector of foreign and inter-state commerce . . . and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. *Newport & Cincinnati Bridge Co.*, 105 U.S. at 480. "Nothing will have been presumed to be surrendered unless it was manifestly so intended[, and] [e]very doubt shall be resolved in favor of the government." *Louisville Bridge Co. v. United States*, 242 U.S. 409, 418 (1917) (quoting *Newport and Cincinnati Bridge Co*., 105 U.S. at 480). Equally, in treaties, "waiver[s] of sovereign authority will not be implied, but instead must be 'surrendered in unmistakable terms.'" *Cherokee Nation of Oklahoma*, 480 U.S. at 707. (quoting *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986)); *Nat'l Railroad Passenger Corp. v. Atchison, Topeka, and Santa Fe Railway Co.*, 470 U.S. 451, 466 (1985) (quoting *Keefe v. Clark*, 322 U.S. 393, 397 (1944)). "Exclusive rights to public franchises are not favored. If granted, they will be protected, but they will never be presumed." *Wright*, 101 U.S. at 796.

b. The ATC Acts contain no perpetual grant of any authority, let alone a perpetual grant of exclusive authority for DIBC to hold a monopoly on all bridges across the Detroit River

Ignoring these well-settled principles of law, Plaintiffs ask the Court to ignore the clear language of the ATC Acts and CTC Acts to make several declarations that Plaintiffs' right to

construct, maintain, and operate a bridge on the Detroit River is both exclusive and perpetual, such that no other entity may operate a bridge between Detroit and Windsor. Compl. ¶ 312. Plaintiffs then ask the Court to order Federal Defendants not to take any actions that would infringe upon these new rights it has asked the Court to declare. Compl. ¶¶ 323-24. This Court cannot grant the relief that Plaintiffs seek, and they have therefore failed to state a valid claim in Counts Two and Three.

The ATC Acts do not contain any express grant of the rights Plaintiffs postulate. The sum total of Congress' grant of rights in the ATC Act is as follows:

> consent of Congress…to American Transit Company…to construct, maintain, and operate a bridge and approaches thereto across Detroit River at a point suitable to the interests of navigation, within or near the city limits of Detroit, Wayne County, Michigan in accordance with the provisions of the [1906 Bridge Act]…

41 Stat. 1439. There is no mention of exclusivity. The statute says only that ATC has the right to "construct, maintain, and operate *a bridge*…." *Id.* (emphasis added). Congress did not say that ATC has the right to construct, maintain, and operate ***the only bridge*** within or near Detroit, and no other bridges may ever be built without ATC's permission.

The statute also does not contain any mention of a grant in perpetuity. In fact, Congress specifically reserved the right to "alter, amend, or repeal" the grant of rights at any time. 41 Stat. 1439. "[T]he effect of these few simple words has been settled" since 1878 when the Supreme Court held that with this language "Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments as come within the just scope of legislative power." *Bowen*, 477 U.S. at 53 (quoting *Sinking Fund Cases*, 99 U.S. 700, 720 (1878)).[14]

[14] In addition to rights being granted in the statutes, Plaintiffs' Third Amended Complaint refers to its rights as arising alternatively under an implied contract that was formed based on the

The reason Congress does not, except in rare circumstances, grant such expansive rights, and the reason courts are unwilling to imply them absent an explicit grant has been clearly explained by the Supreme Court. Adjudicating a similar claim in 1917, the Court noted

> our interstate and foreign commerce is a thing that grows with the growth of the people, and its instrumentalities change with the development and progress of the country, it was not natural that Congress, in enacting a regulation of such commerce should intend to put shackles upon its own power in respect of future regulation.

Louisville Bridge Co., 242 U.S. at 420. As part of its sovereign powers over navigation, commerce, and international relations (among others), the United States retains the right to authorize international bridges, highways, ferries, and other instrumentalities of interstate and foreign commerce for the public good. *See Cherokee Nation*, 480 U.S. at 707 (even when sovereign States gain the absolute right to all their navigable waters and soils under the equal footing doctrine, the United States retains the "paramount power…to ensure that such waters remain free to interstate and foreign commerce").

In *Louisville Bridge*, the Bridge Company had built a bridge across the Ohio River pursuant to Congressional authorizations which stated that "any bridge or bridges erected under [this act] shall be lawful structures and shall be recognized and known as post routes." *Id.* at 414. The Bridge Company completed the bridge in 1870, and went to considerable expense to make the bridge even wider than the minimum width Congress had mandated. *Id.* at 415. In 1914, the

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statutes, or a treaty right arising by virtue of a special agreement under the 1909 Boundary Waters Treaty. Compl. ¶¶ 72-73. Assuming Plaintiffs could establish that the ATC Acts and CTC Acts constituted an implied contract (which they cannot), their claims would fare no better. *See Bowen*, 477 U.S. at 52 (holding that in the context of a statute that created a contractual right "sovereign power…is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms."). Similarly, the Supreme Court has extended the same principle to grants of rights contained in treaties, holding that a "waiver of sovereign authority will not be implied." *Cherokee Nation*, 480 U.S. at 707. Regardless of whether Plaintiffs' claims are based in the statute, an implied contract, or a treaty, they simply cannot state a valid claim for Counts Two and Three.

Secretary of War determined that the bridge constituted an obstruction to navigation under the Rivers and Harbors Act of 1899, passed by Congress nearly 30 years after the Bridge Company had completed construction. *Id.* The Secretary ordered the Bridge Company to make changes to the bridge to increase the horizontal clearance across the river. *Id.* The Bridge Company filed suit, claiming that the "bridge was constructed under an irrevocable franchise, and became on its completion a lawful structure" that Congress could not impair except by payment of just compensation for a taking under the 5th Amendment. *Id.* The Court rejected the Bridge Company's arguments, holding that the Bridge Company had no irrepealable franchise because the words of the statute giving consent to the bridge contained "no words of perpetuity, nor any express covenant against a change in the law." *Id.* at 419. Notably, the statute in *Louisville Bridge* did not contain the express reservation of Congressional right to repeal, alter or amend the statute that is present in the ATC Act. Nonetheless, the Court held that absent a clear grant of perpetual rights, they could not be inferred because Congress retains its rights to regulate commerce absent an express indication that it is giving up that power. *Id.*

When the statute granting permission to build a bridge contains the express reservation of the power to alter amend or repeal, the Supreme Court has been even more clear about the effect of that reservation. Such a reservation "implie[s] that all the risks of revocation and discontinuance were to be assumed by those to whom the grants thus limited were made." *Newport & Cincinnati Bridge Co.*, 105 U.S. at 478. The Court expressly recognized that "withdrawal of the franchise might render property acquired on the faith of it…less valuable; but that was a risk which the company voluntarily assumed when it expended its money under the limited license which alone Congress was willing to give." *Id.* at 482. "It was optional with the company to accept or not what was granted, but having accepted, it must submit to the control

which Congress, in the legitimate exercise of the power that was reserved, may deem it necessary for the common good to insist on." *Id.*

Congress imposed a similar limitation on Plaintiffs. They hold a limited grant of rights from Congress. Plaintiffs (and their predecessors) were under no obligation to undertake any action pursuant to that limited grant offered by Congress, but they did so, and have profited enormously. Now, dissatisfied that the United States has exercised its sovereign right to approve the construction of an additional bridge across the Detroit River, Plaintiffs ask this Court to limit the sovereignty of the United States and declare that it cannot approve any more bridges across the Detroit River except under terms dictated by Plaintiffs. This enormous power finds no root in the simple language of the limited right granted by Congress, and Plaintiffs' request to imply this broad power (from Canadian common law, no less) runs directly contrary to over a hundred years of Supreme Court precedent.

In short, Plaintiffs (or their predecessors) had the right in 1921 to build, operate, and maintain a bridge in the vicinity of Detroit, and they continue to have that right today. It is not an unfettered, exclusive, right in perpetuity – it is exactly the limited grant of rights that Congress gave them in the ATC Acts and no more. DIBC has the option to continue to exercise that right or not, but they do not have the right to limit the United States' sovereign authority to regulate commerce, navigation, and foreign relations under the Constitution. Just as the Charles Bridge Company could not imply a perpetual, exclusive grant in its bridge franchise in 1837, Plaintiffs cannot do so today. Accordingly, Plaintiffs cannot state a valid claim for declaratory or injunctive relief, and Counts Two and Three of Plaintiffs' Complaint must be dismissed.

D. Count Five Of Plaintiffs' Complaint Must Be Dismissed For Lack Of Jurisdiction Under The Tucker Act

The Tucker Act provides that the Court of Federal Claims has exclusive jurisdiction over claims against the United States for money damages exceeding $10,000 that are "founded either upon the Constitution, or any act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1); *see Adams v. Hinchman*, 154 F.3d 420, 425 (D.C. Cir. 1998) ("the Federal Claims Court's jurisdiction in [takings cases] is exclusive" except in "cases in which the amount in controversy is less than $10,000, in which event jurisdiction is concurrent with the federal district courts…."). As a result, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Preseault v. ICC*, 494 U.S. 1, 11 (1990) (quoting *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985)). So long as Tucker Act jurisdiction is available, "the plaintiff is barred from suing for equitable relief in district court." *Student Loan Mktg. Ass'n v. Riley*, 104 F.3d 397, 401 (D.C. Cir. 1997).

The Supreme Court has recognized district court jurisdiction over claims seeking equitable relief in the takings context in only two types of claims. The first is when Congress has expressly withdrawn Tucker Act jurisdiction. *Preseault*, 494 U.S. at 12 (citing *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 126 (1974)). The second is where "a claim for compensation would entail an utterly pointless set of activities" because the challenged government action "requires a direct transfer of money" as opposed to a burden on real or physical property. *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998). In this type of claim, "the presumption of Tucker Act availability must be reversed" and "individuals threatened with a

taking [may] seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." *Id.*; *see also Adams*, 154 F.3d at 425.

This Court has no jurisdiction over Count Five of Plaintiffs' Third Amended Complaint. Plaintiffs "seek a declaratory judgment" that the United States' actions with regard to the NITC and Plaintiffs "constitutes a taking of plaintiffs' franchise rights without payment of just compensation." Compl. ¶ 338. Plaintiffs also seek an injunction to prevent the United States from appropriating their "Congressionally-conferred right to build the New Span" to provide it to "the Canadian defendants and other NITC/DRIC proponents." Compl. ¶ 339. Plaintiffs' claims clearly amount to a request for equitable relief on a claim involving the Federal Defendants' alleged burdening of its real or physical property. Plaintiffs do not allege that Tucker Act jurisdiction has been withdrawn, and indeed do not even mention the Tucker Act anywhere in their Complaint. Plaintiffs are clearly not challenging an action that requires a direct transfer of money to the government. Plaintiffs have alleged only that the Federal Defendants' actions providing various permits or approvals to the proponents of the NITC, and in failing to grant their requests relating to the New Span, somehow constitute an invasion of Plaintiffs right to build, maintain, and operate the Ambassador Bridge. Since neither of the Supreme Court's recognized exceptions to exclusive Tucker Act jurisdiction are present here, Count Five must be dismissed for lack of jurisdiction. *See Preseault*, 494 U.S. at 17 ("petitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature."); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1020 (1984) (holding that District Court had erred in enjoining a taking because "an adequate remedy for the taking exists under the Tucker Act."); *Adams*, 154 F.3d at 425 n.9 (dismissing takings claim because "the circumstances found to support district court jurisdiction in *Eastern Enterprises* do not exist in this case.").

E. Counts Six And Seven Must Be Dismissed Because Plaintiffs Cannot Establish Standing And Because They Are Not Reviewable Under The APA

1. Plaintiffs have failed to establish standing

In Counts Six and Seven, Plaintiffs allege that the issuance of a Presidential Permit for the NITC and the approval of the Crossing Agreement violated the APA. Compl. ¶¶ 340-362. Plaintiffs have failed to establish their standing to challenge the issuance of either the Presidential Permit or the approval of the Crossing Agreement.

"[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992)); *see also Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1148 (2013) (noting that Foreign Intelligence Surveillance Act targeted "*other individuals*") (emphasis in original). The "judicial power" conferred by Article III "'exists only to redress or otherwise to protect against injury to the complaining party,' not to review the legality of governmental conduct in a vacuum." *Coal. for Mercury-Free Drugs v. Sebelius*, 671 F.3d 1275, 1279 (D.C. Cir. 2012) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). A plaintiff must therefore have a "personal stake in the outcome of the controversy" that "justifies the exercise of the court's remedial power on his behalf." *Warth*, 422 U.S. at 498-99 (citation omitted). Specifically, to establish standing, a plaintiff must establish the three "irreducible constitutional minimum" elements of standing: (1) an "injury-in-fact" that (2) is "fairly traceable" to the challenged action and (3) will likely be "redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 560-61; s*ee also Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (plaintiffs bear the burden of showing standing for each type of relief sought). Plaintiffs must have suffered

an "injury in fact" that is both "actual or imminent" and "concrete and particularized," not abstract, generalized, remote or speculative. *Defenders of Wildlife*, 504 U.S. at 560.

Here, the State Department actions challenged in Counts Six and Seven of Plaintiffs' Complaint neither require nor forbid any conduct on the part of Plaintiffs.[15] In light of that fact, Plaintiffs cannot meet their "substantially more difficult" burden to establish standing. That is, Plaintiffs have failed to establish that the issuance of the Presidential permit or approval of the Crossing Agreement will create an actual injury to their interests. The primary injury Plaintiffs allege in their Complaint relates to impairment of their alleged implied franchise rights pursuant to the ATC Acts and CTC Acts.[16] As discussed above, however, Plaintiffs cannot demonstrate that their franchise rights extend beyond a right to construct, maintain, and operate a bridge on the Detroit River, which is entirely subject to repeal, amendment, or alteration by Congress at any time.[17] 41 Stat. 1439. Nothing about the State Department's issuance of the Presidential Permit for the NITC nor its approval of the Crossing Agreement will affect Plaintiffs' rights to

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[15] The State Department actions challenged in Counts Six and Seven were responses to requests by the State of Michigan to obtain a Presidential Permit for a new bridge over the Detroit River, and for approval of an associated Crossing Agreement with the government of Canada. Plaintiffs were not the object of either of the State Department decisions.

[16] Plaintiffs' Complaint also alleges that Plaintiffs believe they will suffer reduced toll revenues if the NITC is constructed. Compl. ¶ 88. As far as injury for purposes of standing, Plaintiffs have no property interest in as-yet-uncollected tolls sufficient to confer standing, and any effect of Federal Defendants' activities on Plaintiffs' tolls is entirely too speculative to support Plaintiffs' standing. Finally, the chain of causation between 1) the issuance of a Presidential permit; 2) any eventual construction of a bridge; and 3) the diversion of toll revenues, involves far too many links and depends on the actions of numerous third parties not before the Court, such that Plaintiffs cannot demonstrate any of the elements of standing.

[17] For purposes of a motion to dismiss, the Court is not required to accept Plaintiffs' unsupported legal conclusions as true. *Browning*, 292 F.3d at 242. Accordingly, the Court can determine that Plaintiffs' allegation of an implied exclusive franchise based on Canadian common law does not properly allege a valid interest.

continue operating their existing bridge.[18] The Supreme Court has described the grant of authority under a bridge statute as "the grant of a franchise, expressly made defeasible at will, to maintain a bridge across one of the great highways of commerce." *Newport & Cincinnati Bridge Co.*, 105 U.S. at 481-82. Although it may be a species of property, "from the moment of its origin its continued existence was dependent on the will of Congress, and this was declared in express terms on the face of the grant by which it was created." *Id.* at 482. Nothing about the State Department's issuance of the Presidential Permit for the NITC or its approval of the Crossing Agreement have in any way injured or affected any of the limited rights that Plaintiffs actually possess (as opposed to the hypothetical rights they are asking this Court to infer). Plaintiffs are unable to establish either an "actual or imminent" injury attributable to the Presidential Permit issuance or the Crossing Agreement approval. They have thus failed to establish the first element of standing, a point driven home by the Supreme Court's recent decisions in *Clapper*, 133 S. Ct. at 1148.

In addition, even if Plaintiffs could allege a valid injury-in-fact, Plaintiffs cannot establish the third element of standing – redressability – with regard to Count Seven. To establish redressability, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Defenders of Wildlife*, 504 U.S. at 561 (internal quotation marks and citation omitted). The Crossing Agreement in and of itself is simply an agreement between the State of Michigan and Canada addressing certain aspects of building and operating

[18] Plaintiffs also cannot allege an injury related to their ability to construct the New Span, because they do not own all of the property rights to permit them to construct the New Span. Compl. ¶ 146. Any injury they might allege with regard to the NITC Presidential Permits would not be redressable, because Plaintiffs' ability to build the New Span is hypothetical unless and until they obtain the property rights necessary to apply for a Coast Guard permit and to build the New Span, which the city of Detroit has consistently and adamantly withheld, and obtain Canada's consent, which Canada has consistently and adamantly withheld. *See Defenders of Wildlife*, 504 U.S. at 561.

the proposed bridge. The IBA does not require such an agreement as a precondition to building a bridge; it simply gives Congress' consent in the event a State enters into an agreement with Canada or Mexico. *See* 33 U.S.C. §535a. Plaintiffs have not demonstrated any connection between the approval of the Crossing Agreement and their alleged injuries that would permit the Court to find that the injuries are redressable. Even if the Court were to invalidate the approval of the Crossing Agreement as Plaintiffs suggest, the Presidential Permit would remain intact, and it would be entirely speculative as to whether the lack of a Crossing Agreement would have any ultimate effect on the injuries that Plaintiffs allege. The Presidential Permit is not predicated on the Crossing Agreement, and it would survive the Crossing Agreement's demise. Accordingly, Plaintiffs cannot demonstrate that their alleged injuries with regard to Count Seven would be redressed by a favorable ruling, and Plaintiffs therefore lack standing to bring that claim. *Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008) (where relief "depends on actions by a third party not before the court, the petitioner must demonstrate that a favorable decision would create a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.") (internal quotation marks and citation omitted).

2. The State Department's issuance of a Presidential Permit is non-reviewable under the APA because it is Presidential action

Plaintiffs challenge the State Department's decision to issue a Presidential Permit to the NITC under Section 706(2) of the APA, which provides for judicial review of final agency action. Compl. ¶¶ 340-51. This means that Plaintiffs' claims are only viable to the extent that the issuance of the Presidential Permit constitutes final agency action. 5 U.S.C. § 704. The State Department's decision to issue the Permit, however, is not a final agency action; rather it is a presidential action and therefore unreviewable under the APA. *See Franklin v. Massachusetts*, 505 U.S. 788, 799 (1992); *Dalton v. Specter*, 511 U.S. 462, 470 (1994); *Natural Res. Def.*

Council, Inc. v. U.S. Dep't of State ("*NRDC*"), 658 F. Supp. 2d 105, 111 (D.D.C. 2009); *Sisseton-Wahpeton Oyate v. U.S. Dep't of State*, 659 F. Supp. 2d 1071, 1081 (D.S.D. 2009). Accordingly, Plaintiffs lack a private cause of action and therefore have failed to state a claim for which relief can be granted.

The State Department's decision to grant a Presidential Permit is a presidential action. The State Department's authority to grant the Presidential Permit in this case is derived from Executive Order No. 11,423, as amended. 33 Fed. Reg. 11741 (Aug. 16, 1968); *see* 78 Fed. Reg. 23327 (Apr. 18, 2013) (Presidential Permit for the NITC citing various Executive Orders providing the authority for the permit); *see also Sierra Club v. Clinton*, 689 F. Supp. 2d 1147, 1162 (D. Minn. 2010) ("Executive Order 11,423 granted the Secretary of State the authority to grant or deny permits for certain types of border crossing facilities."). Executive Order 11,423 states that authority to issue permits for construction of border facilities arises "by virtue of the authority vested in me as the President of the United States…." 33 Fed. Reg. at 11741. This authority, whether exercised by the State Department or by the President himself, is grounded in the President's constitutional authority over foreign relations. *Id*. (stating that "proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance…of facilities connecting the United States with a foreign country."). The Secretary's authority to issue permits is limited to those situations in which the State Department finds that the project at issue "would serve the national interest." *Id*. at § 1(d). The Secretary may not issue the permit if, after consultation, one of a number of agency heads disagrees with the Secretary's proposed determination of the national interest, and requests that the permit be referred to the President. *Id.* at § 1(f). The Secretary's determination regarding the permit is therefore subject to the ultimate authority of the President.

In a similar context, this Court has already held that the issuance of permits by the State Department pursuant to Executive Order No. 13,337, 69 Fed. Reg. 25299 (Apr. 30, 2004),[19] is a presidential action, which is unreviewable under the APA. *NRDC*, 658 F. Supp. 2d at 109. The court in that case explained that, in distinguishing between agency and presidential action, the key consideration is not whether the President is the final actor. *Id*. Rather, the court observed that the determinative consideration, as laid out by the Supreme Court in *Franklin* and *Dalton*, is whether "'the President's authority to direct the [agency] in making policy judgments' is curtailed in any way or whether the President is 'required to adhere to the policy decisions' of the agency." *Id*. at 111 (quoting *Franklin*, 505 U.S. at 799). Because the district court found that "the President has complete, unfettered discretion over the permitting process," the court held that the issuance of a Presidential Permit by the State Department is Presidential action. *NRDC*, 658 F. Supp. 2d at 111. To hold otherwise "would run afoul of the separation of powers" principle because it would subject permitting decisions to judicial review which would otherwise be unreviewable had the President made them himself. *Id*. Moreover, "[t]o treat those decisions as agency action 'would suggest the absurd notion that all presidential actions must be carried out by the President him or herself in order to receive the deference Congress has chosen to give to presidential action." *Id*. at 112 (quoting *Tulare County v. Bush*, 185 F. Supp. 2d 18, 28 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002)).[20]

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[19] Executive Order 13,337 amends Executive Order 11,423 to address different types of border facilities, including energy production and transmission projects. 69 Fed. Reg. 25299.

[20] The District Court for the District of South Dakota has also held that permits issued pursuant to Executive Order No. 13,337 are Presidential actions. *Sisseton-Wahpeton*, 659 F. Supp. 2d at 1081. The *Sisseton-Wahpeton* Court's reasoning is similar to that of *NRDC*. Namely that, under *Franklin*, the action is Presidential because the President "retains the authority to issue a final decision on whether or not to issue the presidential permit." *Id*. The court then observed that the President is free to delegate such power "to the heads of executive departments

Although the issuance of the Presidential Permits at issue in *NRDC* were based on the President's executive authority under the Constitution, the principle is no less applicable to Presidential actions rooted in shared statutory and constitutional authority. In *Chicago & S. Airlines v. Waterman S.S. Corp.*, the Supreme Court concluded that Presidential action was not reviewable even though it was derived in part from statute and in part from inherent Constitutional authority. 333 U.S. 103, 109-11 (1948). The Court recognized that "Congress may of course delegate very large grants of its power over foreign commerce to the President…[but] the President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Id.* at 109. "Legislative and Executive powers are pooled obviously to the end that commercial strategic and diplomatic interests of the country may be coordinated and advanced without collision or deadlock between agencies." *Id.* at 110. Moreover, the "very nature of executive decisions as to foreign policy is political, not judicial[;] [s]uch decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative….and have long been held to belong in the domain of political power, not subject to judicial intrusion or inquiry." *Id.* at 111. The *Chicago & S. Airlines* Court concluded that until the President approved the decision, it was not a final agency action, but after the President approved the decision, the final order was a political exercise of Presidential discretion that was not subject to judicial review. *Id* at 114. Accordingly, even if the issuance of a Presidential Permit stems in part from authority delegated in the 1972 IBA as Plaintiffs allege, it would not change the analysis. The President, through the Executive

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. . . and those delegation actions that are carried out create a presumption of being as those of the President." *Id*. at 1082. The implication, then, is that the action is not transformed into agency action simply because the State Department sometimes carries out the issuance of the permit in lieu of the President. *Id*. This reasoning applies equally to the same actions taken under Executive Order 11,423.

Orders also exercises his own inherent authority over matters of foreign policy. Even in the exercise of pooled legislative and executive authority, Presidential action is unreviewable under the APA. Thus, Plaintiffs' characterization of the State Department's conduct as a final agency action, Compl. ¶351, is incorrect and Plaintiffs do not have a cause of action under the APA to challenge the decision to grant the permit. *Chi. & S. Airlines*, 333 U.S. at 111.

Plaintiffs do not point to any other statutory cause of action, nor could they. Because Plaintiffs lack a private cause of action, they fail to prove any set of facts that would support a claim entitled to relief. Accordingly, Count Six of Plaintiffs' Complaint should be dismissed pursuant to Rule 12(b)(6).

3. Issuance of the Presidential Permit and approval of the Crossing Agreement are not subject to judicial review because they are agency actions committed to agency discretion by law

Even if the Court were to conclude that the issuance of Presidential Permit by the State Department constituted agency action, rather than Presidential action, the APA still provides no basis for the Court to review Plaintiffs' claims because issuance of the permit and the approval of the Crossing Agreement were undertaken pursuant to executive authority over foreign relations and therefore were committed to agency discretion by law. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C. Cir. 1997) (holding that State Department issuance of visas was unreviewable under the APA as agency action "committed to agency discretion by law.") (citation omitted); *see also Jensen v. Nat'l Marine Fisheries Serv.*, 512 F.2d 1189, 1191 (9th Cir. 1975); 5 U.S.C. § 701(a)(2). "If in the [statute] Congress delegated to the President authority to make a decision in the province of foreign affairs, clearly the courts would have no authority to second-guess the President's decisions or those of his designees with respect thereto." *Rainbow Navigation, Inc. v. Dep't of*

Navy, 620 F.Supp. 534, 541 (D.D.C. 1985) *aff'd*, 783 F.2d 1072 (D.C. Cir. 1986) (citing *Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294 (1933)).

In *Legal Assistance for Vietnamese Asylum Seekers*, the D.C. Circuit was faced with a claim challenging the State Department's issuance of visas and noted that "the agency is entrusted by a broadly worded statute with balancing complex concerns involving security and diplomacy." 104 F.3d at 1353. "[W]here the President acted under a congressional grant of discretion as broadly worded as any we are likely to see, and where the exercise of that discretion occurs in the area of foreign affairs, we cannot disturb his decision simply because some might find it unwise or because it differs from the policies pursued by previous administrations." *Id.* (quoting *DKT Memorial Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 282 (D.C. Cir. 1989)). "In light of the lack of guidance provided by the statute and the complicated factors involved in consular venue determinations, we hold that plaintiffs' claims under both the statute and the APA are unreviewable because there is 'no law to apply.'" *Legal Assistance*, 104 F.3d at 1353.

Here, the IBA provides broad discretion to the President (in the case of Presidential Permits under 33 U.S.C. § 535b) and to the State Department directly (in the case of approvals of international agreements in 33 U.S.C. § 535a), in areas that involve complex concerns regarding foreign relations, diplomacy, and national interest. "By long-standing tradition, courts have been wary of second-guessing executive branch decisions involving complicated foreign policy matters." *Legal Assistance*, 104 F.3d at 1353. Were this Court to attempt to review the decisions on the Presidential Permit or the Crossing Agreement, there would be no clear standard against which the Court could measure whether the decisions were actually consistent with United States foreign policy (in the case of Crossing Agreements), or whether they were in the national interest

(in the case of Presidential Permits). Accordingly, these decisions are not reviewable under the APA, and Counts Six and Seven must be dismissed for failure to state a claim.

F. Count Eight Must Be Dismissed For Lack Of Jurisdiction

Recognizing the jurisdictional defects in their APA challenges to the Presidential Permit and Crossing Agreement decisions, Plaintiffs attempt to salvage their claims with resort to the "extremely limited" doctrine of non-statutory review of ultra-vires and unlawful action (Compl. ¶¶ 363-69). *See Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). This narrow exception derives from "the historic origins of judicial review for agency actions in excess of jurisdiction." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172-73 (D.C. Cir. 2003) (quoting *Griffith*, 842 F.2d at 492 & citing *Leedom v. Kyne*, 358 U.S. 184, 188 (1958) as the "leading case" on the issue). The D.C Circuit has explained that "review may be had only when the agency's error is patently a misconstruction of the Act, or when the agency has disregarded a specific and unambiguous statutory directive, or when the agency has violated some specific command of a statute." *Griffith*, 842 F.2d at 493 (internal citations and quotations omitted). Garden variety errors of fact or law are not enough. *Id.* Indeed, "[i]n *Kyne* itself, the Court noted that the suit was 'not one to review', in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction[;] [r]ather it is one to strike down an order of the Board made in excess of its delegated powers." *Id.* (quoting *Kyne*, 358 U.S. at 188). "[E]ven if [an agency] erred as a matter of law, . . .this by itself cannot support assertion of jurisdiction under the *Kyne* exception." *Griffith v. Fed. Labor Relations Auth.*, 697 F. Supp. 1, 3 (D.D.C. 1986) *aff'd*, 842 F.2d 487 (D.C. Cir. 1988) (citing *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492, 496 & n.4 (D.C. Cir. 1980). Unless a plaintiff establishes a claim that falls within the narrow scope of non-statutory review, the Court lacks jurisdiction over the claims. *Griffith*,

842 F.2d at 494 (holding that "the district court correctly concluded that it was without jurisdiction to review the appellant's non-constitutional claims.").

Ignoring this well-settled narrow scope of non-statutory review, Plaintiffs have simply re-cast their garden variety APA arbitrary and capricious claims as challenges to allegedly ultra-vires actions subject to non-statutory review. Compl. ¶ 366-67 (alleging that if Counts Six and Seven are not reviewable under the APA, then they are reviewable as ultra-vires actions, and incorporating each of the allegations by reference).

None of Plaintiffs' specific allegations of State Department actions in Counts Six and Seven are sufficient to invoke the Court's narrow non-statutory review jurisdiction. First, Plaintiffs allege that the State Department's Presidential Permit for the NITC exceeds the authorization of the 1972 IBA. Compl. ¶ 342. This is untrue. Plaintiffs argue that because they enjoy exclusive perpetual rights to any bridge in the vicinity of Detroit, express Congressional authorization is required for any bridge other than theirs. *Id.* They argue that Executive Order No.13,337, "expressly refrained from delegating to the Secretary of State the power to approve any bridge that required Congressional authorization," and that the Secretary of State therefore was not authorized to issue a Presidential Permit for the NITC, because Congressional authorization is required for any new bridge on the Detroit River. *Id.* As explained in Section III.C.2. above, this is an entirely unsupportable legal proposition that runs counter to express Supreme Court precedent.[21] There is nothing in any of the ATC Acts or CTC Acts that would require Congressional consent to build a second bridge across the Detroit River beyond that already granted in the 1972 IBA.

[21] The Court is not required to accept Plaintiffs' legal conclusions as true in deciding a motion to dismiss. *See Browning*, 292 F.3d at 242.

In addition, the alleged violations in Paragraphs 342, 344, and 345 of Plaintiffs' Complaint all challenge the exercise of the President's discretion under the 1972 IBA. Assuming for purposes of argument that Plaintiffs have correctly characterized the relevant statutory and executive authorities involved, where a statute "commits decisionmaking to the discretion of the President, judicial review of the President's decision is not available." *Dalton*, 511 U.S. at 476-77. Here, the 1972 IBA expressly confers discretion on the President directly to provide his approval. 33 U.S.C. § 535b (prohibiting the construction of an international bridge "unless the President has given his approval"). "In the course of determining whether to grant such approval, the President shall secure the advice and recommendations of…the heads of such departments and agencies of the Federal Government *as he deems appropriate to determine the necessity of such a bridge.*" *Id.* (emphasis added). The Supreme Court has clearly held that "[h]ow the President chooses to exercise the discretion Congress has granted him is not a matter for our review." *Dalton*, 511 U.S. at 476. Accordingly, Plaintiffs' first and third alleged violations of law are not sufficient to establish non-statutory review jurisdiction.

In Paragraphs 343, 346-47, and 354-56, Plaintiffs allege that the issuance of the Presidential Permit and approval of the Crossing Agreement violates the statutory franchise rights of DIBC to build the New Span as expressed in the ATC and CTC Acts, the alleged Special Agreement, and the 1909 Boundary Waters Treaty. As explained in Section III.C., above, however, there is no statutory mandate at all in the ATC Acts or the CTC Acts, or the Boundary Waters Treaty, and Plaintiffs' Complaint hinges on implied rights of exclusivity allegedly derived from Canadian common law. Compl. ¶¶ 79-88. As such, Plaintiffs fail to allege the requisite "specific and unambiguous statutory directive" or a violation of "some specific command of a statute." *Griffith*, 842 F.2d at 493 (citations omitted). The Court therefore lacks

jurisdiction to review these claims as non-statutory review claims. *Physicians Nat'l House Staff*, 642 F.2d at 496 ("in order to qualify for the *Leedom v. Kyne* exception a plaintiff must be able to identify a specific provision of the Act which, although it is clear and mandatory has nevertheless been violated") (internal citations and quotation marks omitted).

In Paragraphs 348 and 359, Plaintiffs allege that the State Department acted contrary to law by failing to conduct an independent NEPA review. Compl. ¶¶ 348; 359. First, Plaintiffs lack standing to challenge NEPA compliance here, because their asserted economic interests are not within the zone of interests protected by NEPA. *ANR Pipeline Co. v. FERC*, 205 F.3d 403, 408 (D.C. Cir. 2000) (holding that plaintiff lacked NEPA standing because "[i]ts only concern is with suppressing competition from Nautilus, and that economic interest is not within the zone of interests protected by NEPA."). Second, the issuance of a Presidential Permit is Presidential action and not agency action, and "NEPA only applies to agency action." *Tulare Cnty.*, 185 F. Supp. 2d at 29 (dismissing NEPA claim related to Presidential proclamation for lack of jurisdiction). Since NEPA does not apply, Plaintiffs have failed to allege the requisite "specific and unambiguous statutory directive" or a violation of "some specific command of a statute." *Griffith*, 842 F.2d at 493. Moreover, Plaintiffs have already challenged the NEPA analysis for the NITC/DRIC, which has been upheld in the face of their challenge. *See Latin Ams. for Soc. & Econ. Dev. v. Adm'r of Fed. Highway Admin.*, 858 F. Supp. 2d 839, 859 (E.D. Mich. 2012) ("While the Bridge Company believes that the FHWA …[a]s set forth above, the FHWA thoroughly evaluated reasonable alternatives and reasonably established the project's Purpose and Need.")[22]; s*ee also Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004). The NITC

[22] That decision is currently on appeal to the Sixth Circuit in *Latin Americans for Social and Economic Development, et al v. Administrator of the FHWA*, et al, Case No. 12-1556/12-1558 (6th Cir.).

has been fully analyzed under NEPA, and the State Department reviewed and adopted that analysis in issuing the Presidential Permit and approving the Crossing Agreement. Accordingly, Plaintiffs can point to no statutory mandate that has been violated, and this allegation is not proper for non-statutory review.

In Paragraph 349, Plaintiffs allege that the Presidential Permit was contrary to law because it depended on the approval of the Crossing Agreement, which was itself illegal. Compl. ¶ 349. This is untrue. The approval of the Crossing Agreement and the issuance of the Presidential Permit are independent actions governed by different statutory and executive authorities. Plaintiffs have not identified a specific statutory mandate tying the two decisions together nor have they identified a specific command of a statute that was violated. The Court therefore lacks jurisdiction to review this claim as a non-statutory review claim.

In Paragraphs 350 and 358, Plaintiffs allege only that the State Department's determination of necessity or of national interest and the approval of the Crossing Agreement were not supported by the evidence. Compl. ¶ 350; 358. As to the State Department's determination under the 1972 IBA, judicial review is not available because the 1972 IBA confers discretion on the President. *Dalton,* 511 U.S. at 477. Moreover, the alleged errors are precisely the type of garden-variety errors of fact or law that the D.C. Circuit has held insufficient to invoke the Court's non-statutory review jurisdiction. *Griffith*, 842 F.2d at 493.

In Paragraph 353, Plaintiffs allege that the Crossing Agreement was approved under the auspices of the 1972 IBA, which Plaintiffs claim is an unconstitutional delegation of power. Compl. ¶ 353. This is not a proper basis for non-statutory review, because it presupposes the illegality of the 1972 IBA. It is simply derivative of Plaintiffs' Count One, which directly challenges the constitutionality of the 1972 IBA, and not proper for non-statutory review.

Paragraph 357 challenges the State Department's approval of the Crossing Agreement based on an alleged violation of Michigan State law because the proponents of the Crossing Agreement were not acting under authority of the Michigan legislature. Compl. ¶ 357. Plaintiffs aver generally that somehow the approval violates the non-delegation doctrine, the Tenth Amendment of the United States Constitution, and the Guaranty Clause in Article IV, Section 4 of the Constitution. *Id.* Plaintiffs do not identify any specific statutory mandate that was violated and do not explain how approval of the Crossing Agreement violates the non-delegation doctrine, the Tenth Amendment, or the Guaranty Clause. In addition, Plaintiffs claim that the approval violates the 1972 IBA because the statute requires an application from a "State or a subdivision, or instrumentality thereof." *Id.* Plaintiffs explain that the basis for this as a violation of the IBA rests on the allegation that this statutory command "*implicitly* cannot include the Governor or any state agency in violation of State law." *Id.* (emphasis added). This allegation is therefore insufficient to invoke non-statutory review jurisdiction, which requires an unambiguous explicit statutory directive. *See Griffith*, 842 F.2d at 493.

In Paragraph 360, Plaintiffs challenge the approval of the Crossing Agreement as failing "to protect and serve the national interest." Compl. ¶ 360. Again, for purposes of invoking non-statutory review jurisdiction Plaintiffs are obligated to allege a specific statutory mandate that has been violated. Paragraph 360 does not do so, and therefore the alleged violation cannot provide a jurisdictional basis for the Court's non-statutory review.

In short, none of the individual alleged "violations of law" incorporated into Count Eight are sufficient to invoke the Court's very narrow non-statutory review jurisdiction. Accordingly, Count Eight must be dismissed for lack of jurisdiction pursuant to Rule 12(b)(1).

G. Count Nine Of Plaintiffs' Complaint Fails To Plead A Valid Claim That Plaintiffs' Equal Protection Rights Were Violated

"To properly plead a 'class of one' Equal Protection claim, a plaintiff must demonstrate they have 'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Neighborhood Assistance Corp. of Am. v. Consumer Fin. Prot. Bureau*, 907 F. Supp. 2d 112, 126 (D.D.C. 2012) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). Both of these two elements, differential treatment and no rational basis, are "essential." *Id.* at 126-27 (citing *3883 Conn. LLC v. District of Columbia*, 336 F.3d 1068, 1075 (D.C. Cir. 2003)). The Supreme Court has recognized that

> There are some forms of state action, however, which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be "treated alike, under like circumstances and conditions" is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.

Engquist v. Or. Dep't of Agric., 553 U.S. 591, 603 (2008). The Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (citation omitted); *Kingman Park Civic Ass'n v. Gray*, No. 13-990 CKK, 2013 WL 3871444, at *8 (D.D.C. July 29, 2013). "The threshold inquiry in evaluating an equal protection claim is, therefore, to determine whether a person is similarly situated to those persons who allegedly received favorable treatment." *Women Prisoners of D.C. Dep't of Corrs. v. District of Columbia*, 93 F.3d 910, 924 (D.C. Cir. 1996) (internal citations and quotations omitted). "Accordingly, when dissimilar governmental treatment is not the product of a one-dimensional decision-such as a standard easement or a tax assessed at a pre-set percentage

of market value-the similarly situated requirement will be more difficult to establish." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1203-04 (11th Cir. 2007).

1. Plaintiffs cannot allege that they are similarly situated to the NITC proponents or that they have been subject to differential treatment

Here, Plaintiffs have failed to sufficiently plead either of the two elements required to state a valid equal protection claim. First, even accepting the factual allegations in Plaintiffs' Complaint as true, Plaintiffs have failed to plead that they are similarly situated to the proponents of the NITC or that they have been subject to differential treatment.

Plaintiffs cannot show that they are similarly situated to the NITC proponents. Plaintiffs' authority for building the New Span in the United States derives from the original consent of the United States Congress in the 1921 ATC Act. Compl. ¶¶ 57-59. Plaintiffs' attempts to build the New Span are subject to an entirely different statutory and administrative regime than the NITC proponents. For example, Plaintiffs explain that they are not required to obtain a Presidential Permit for the New Span because it "is only seeking to expand (or twin)" the existing bridge and because their authorization pre-dates the IBA. *Id*. ¶¶ 142, 144. The NITC proponents on the other hand, are subject to the IBA, and were required to obtain a Presidential Permit as well as obtain approval for any associated agreement with Canada. *Id*. ¶¶ 256-67.

In addition, Plaintiffs admit that they are privately held corporate entities in the United States and Canada. Compl. ¶¶ 20-25. None of the Plaintiffs are sovereign governments or agencies of sovereign governments. Compl. ¶¶ 20-25; *see also Commodities Exp. Co. v. City of Detroit*, 09-CV-11060-DT, 2010 WL 2633042, at *20 (E.D. Mich. June 29, 2010) (holding that Plaintiffs did not have powers of eminent domain or federal instrumentality status). According to Plaintiffs, the NITC proponents, on the other hand, are the Government of Canada and the State of Michigan represented by their respective executive agencies and departments. Compl. ¶¶ 31,

181.[23] Plaintiffs admit that as state and/or federal sovereign entities the proponents of the NTIC have independent sovereign powers, including the powers of eminent domain, which place them on a much different footing than Plaintiffs with respect to the ability to obtain property rights for the construction of a bridge. *Id*. ¶ 241. As a result, accepting Plaintiffs' allegations as true, Plaintiffs cannot contend that they are similarly situated to the NITC proponents for purposes of equal protection, and therefore fail to state a valid claim for an equal protection violation. *Sun Coach Lines, L.L.C. v. Port Auth. Of Allegheny Cnty.*, No. 07-1044, 2009 WL 1324144, at *9 (W.D. Pa. May 12, 2009) ("'there is a fundamental difference between public agencies and private companies' such that the WCTA cannot be considered substantially similar to Plaintiffs").

Similarly, Plaintiffs have failed to sufficiently allege differential treatment. Plaintiffs identify four allegedly discriminatory actions that form the basis for this claim: 1) a concerted effort by all defendants to build the NITC and to prevent Plaintiffs from exercising their alleged right to build the New Span; 2) Coast Guard's refusal to grant Plaintiffs a navigational permit for the New Span; 3) Coast Guard's decision to delay and refuse to finalize its NEPA review of the New Span, while FHWA accelerated the NEPA approvals for the NITC; and 4) State Department's decision to grant the NITC a Presidential Permit. Compl. ¶ 278. According to Plaintiffs these actions "discriminate[d] against the approval of the plaintiffs' New Span and in favor of the accelerated approval of the government-owned NITC/DRIC." *Id.*

[23] Although Plaintiffs refer to "Canada's And FHWA's Proposed NITC/DRIC" (Compl. at p. 52), neither FHWA, the United States, nor any other Federal Agency is a proponent of the NITC. Rather, the United States and its agencies play the same role in the NITC process as they do in the process for Plaintiffs' proposed New Span, namely they are responsible under certain statutes to issue permits and approvals. With regard to Canada, although it seeks to build the NITC in conjunction with the State of Michigan, the State was the sole applicant for the Presidential Permit and for approval of the Crossing Agreement.

None of Plaintiffs' factual allegations demonstrate differential treatment sufficient to support an equal protection claim. Plaintiffs allege that Federal Defendants have prevented Plaintiffs from exercising their asserted right to build the New Span,[24] but Plaintiffs' own allegations demonstrate that the NITC has been in planning and development for nearly as long as the New Span. Plaintiffs' Complaint alleges that the "Canada-United States-Ontario-Michigan Border Transportation Partnership Charter was adopted on February 2, 2005, over eight years ago. Compl. ¶ 184. According to Plaintiffs, the parties entered into a Memorandum of Cooperation in 2007. *Id*. ¶ 184-85. Nevertheless, Plaintiffs do not allege that the NITC is any closer to completion than Plaintiffs' New Span. The primary delay in Plaintiffs' New Span on the United States' side of the border has been occasioned by their own refusal or inability to obtain the necessary property rights to enable construction of their proposed bridge and to complete their application for a Coast Guard permit. *See id*. ¶ 170 (explaining that Plaintiffs need to acquire the air rights over land owned by the City of Detroit, but that Detroit has stated that it was not interested in selling the parcel of land). Plaintiffs cannot attribute their own inability to secure necessary rights from the City of Detroit to differential treatment by Federal Defendants.

Far from being discriminated against, Plaintiffs admit that the State Department recognized they were exempt from the necessity of obtaining a Presidential Permit for building the New Span. *Id*. ¶ 144. Plaintiffs also admit that FHWA has recognized and confirmed that

[24] Plaintiffs persist in asserting that they have a "right" to build the New Span, but even a casual examination of the support they cite demonstrates this to be false. For example, the State Department letter repeatedly cited by Plaintiffs for this proposition recognizes no such "right." It does no more than confirm that, as owners of a Congressionally authorized bridge "grandfathered" by the 1972 IBA, the Plaintiffs would not need a Presidential Permit for the proposed New Span. The State Department has never suggested that this dispenses Plaintiffs from the necessity of obtaining all necessary property rights, or relevant authorizations and permits from other federal, state, provincial and local authorities on both sides of the border. Plaintiffs have never succeeded in obtaining these, and accordingly cannot be said to have any unqualified "right" whatsoever to build the New Span.

Plaintiffs' construction of the Ambassador Bridge Gateway Project was designed at least in part to facilitate Plaintiffs' ability to build a New Span. *Id*. ¶ 145. Indeed, but for Plaintiffs' own refusal or inability to obtain the necessary property rights for construction of its proposed New Span, they would likely be well on their way to securing the United States approvals necessary to begin construction.

However, the approvals for building international bridges do not turn on United States domestic approvals alone. To the contrary they involve foreign relations, foreign policy, and national interest determinations, and thus are exactly the sort of complex discretionary decision-making processes that the Supreme Court cautioned about in *Engquist*. 553 U.S. at 603. Even if Plaintiffs could demonstrate that the NITC proponents were somehow treated differently, there are simply too many independent discretionary decisions based on the highly individualized nature of the projects to provide any meaningful comparison between the entities or the actions taken during the approvals processes. Plaintiffs complain about the Coast Guard's processing of the navigation permit for the New Span, but the NITC proponents have not even submitted an application to the Coast Guard yet. So there is no basis for comparison. By contrast, the NITC proponents have applied for and obtained a Presidential Permit and approval of their Crossing Agreement, but Plaintiffs have been exempted from both of those requirements as a result of the particular circumstances of the New Span and its relation to the original Ambassador Bridge. Plaintiffs therefore have failed to carry their burden to plead a valid "class of one" equal protection claim. *See Srail v. Vill. of Lisle, Ill.*, 588 F.3d 940, 945 (7th Cir. 2009) (denying equal protection claim for city's decision to extend water mains to some neighborhoods but not others, based on *Engquist*). Count Nine must be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

2. Assuming Plaintiffs could establish differential treatment, Plaintiffs cannot show the absence of a rational basis

A "classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). "[T]he Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decision-maker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992) (citing *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 809 (1969) for the proposition that "legitimate state purpose may be ascertained even when the legislative or administrative history is silent"); *see also, Engquist*, 553 U.S. at 612 n.2 (Stevens, J., dissenting) (noting that "the lower court could have dismissed the claim if it discerned 'any reasonably conceivable state of facts that could provide a rational basis for the [State's actions],' even one not put forth by the State.") (alterations in original).

Here, Plaintiffs cannot meet their heavy pleading burden to show that there is no reasonably conceivable state of facts that could provide a rational basis for their alleged differential treatment. As noted above, with regard to Plaintiffs' complaints about the Coast Guard permitting process, it is entirely rational to treat a private corporation with no eminent domain powers differently than a sovereign entity which has powers of eminent domain. The power of eminent domain eliminates any concern that the proponent will not be capable of eventually obtaining the necessary rights of way to construct a proposed bridge. Without that power, it is eminently reasonable to require a private company to demonstrate that it can obtain the necessary property rights (especially where the current owner has expressed an affirmative intent not to convey those rights). *See* Compl. ¶¶ 146, 170. Similarly, Plaintiffs' allegations

regarding the State Department's issuance of the NTIC Presidential Permit cannot satisfy Plaintiffs' burden. Plaintiffs were not required to obtain a Presidential Permit. *Id*. ¶144. The NITC proponents, on the other hand, were required to apply for and obtain a Presidential Permit. The obvious reason for this is that the State Department determined that the NITC was subject to the requirements of the 1972 IBA. There is nothing irrational or arbitrary about this treatment.

Indeed, even if Plaintiffs' Complaint set forth facts of differential treatment, the Complaint itself has identified four conceivable rational bases for doing so. *See id*. ¶¶ 217-41 (identifying "Traffic Needs" "Community Impacts to Canada" "Need for Redundancy" and "Need for Public Governance" as "reasons cited by Canada and FHWA for pursuing the NITC/DRIC"). Although Plaintiffs argue about the validity of the reasons, any one of those would suffice as a rational basis to survive an equal protection challenge. For purposes of equal protection, the identification of a rational basis "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. at 315. Plaintiffs have failed to sufficiently plead a valid claim alleging differential treatment with no rational basis. As a result, Count Nine must be dismissed.

IV. CONCLUSION

For all the foregoing reasons, Federal Defendants respectfully request that the Court grant their Motion to Dismiss all counts of Plaintiffs' Complaint and render judgment for Federal Defendants and against Plaintiffs on all counts in Plaintiffs' Complaint.

Dated: August 30, 2013

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, hereby certify that, on August 30, 2013, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 30, 2013 /s/ *Brian M. Collins*